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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1488**

State of Minnesota,
Respondent,

vs.

Keith Lamar Robinson,
Appellant.

**Filed July 23, 2018
Affirmed
Kirk, Judge**

Dakota County District Court
File No. 19HA-CR-16-3664

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Deanna N. Natoli, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges his convictions of first-degree criminal sexual conduct, false imprisonment, and threats of violence, arguing that the district court deprived him of his

right to a speedy trial by granting the state's motion for a continuance and that the district court abused its discretion by admitting *Spreigl* evidence. We affirm.

FACTS

Appellant Keith Lamar Robinson met D.D., a young African American woman, in September 2016 at D.D.'s workplace while she was working. They exchanged phone numbers and began texting each other. Less than one week later, D.D. met appellant outside of his house where they sat in her car and talked. The evening of September 20, 2016, they met in person for the second time at appellant's house. Appellant suggested that they go rent a movie, and appellant drove.

After renting the movie, D.D. expected to watch it at appellant's house, but instead appellant drove them to a lake, and they went for a walk. After the walk, it was late and D.D. asked appellant to take her back to her car, which was still parked at appellant's house. Instead, appellant drove in the opposite direction and parked near a park, in West St. Paul. Appellant played the movie in the car, but D.D. did not watch it. D.D. started to feel uncomfortable, and appellant asked her why she was being quiet. At some point, appellant asked D.D. to move to the backseat. D.D. was still feeling uncomfortable and did not want to move but went to the backseat with appellant.

In the backseat, appellant became aggressive, pulled D.D.'s hair and then grabbed her by the neck and strangled her to the point that her vision became blurry and she felt lightheaded. Appellant told D.D. to stop playing with him and threatened to throw her body in the river. Appellant also threatened D.D. not to call the police, and D.D. feared for her life. Appellant then removed D.D.'s pants and underwear and sexually penetrated

her with his penis. D.D. testified that she did not consent but felt she had to do “[w]hatever he wanted.”

Appellant and D.D. later returned to the front seat and appellant sexually penetrated D.D. a second time. They stayed in the car overnight. D.D. did not want to stay in the car but felt that she had no choice. The next morning, appellant drove D.D. back to her car, and later that day, he texted, called, and left voicemails on D.D.’s phone. The following day, D.D. sought medical attention and reported the incident to the police.

The state filed a complaint on September 28, 2016. Appellant made a speedy-trial demand on October 26. In December, the district court granted the state’s request for a continuance of the trial beyond the 60-day speedy-demand timeline because the Bureau of Criminal Apprehension (BCA) could not complete its DNA analysis until at least January 17, 2017, and appellant did not stipulate as to what the DNA analysis would show. Appellant’s trial began on January 23, 89 days after appellant’s speedy-trial demand.

On the second day of trial, the state received initial reports of another alleged act of sexual assault by appellant of another young African American woman named A.W., in St. Paul, in August 2016. The state provided the information to defense counsel but did not seek to admit the alleged incident as *Spreigl* evidence during the first trial. The first trial ended in a mistrial, at appellant’s request, after inadvertent prejudicial comments were made by one of the state’s witnesses. However, the court ordered that a new trial commence because the prosecutor did not intentionally elicit the testimony.

A second trial began on March 14, 2017. At the second trial, the state sought to admit, and the court allowed, the *Spreigl* evidence of the alleged incident involving A.W.

and appellant. The jury found appellant guilty of first-degree criminal sexual conduct, false imprisonment, and threats of violence. This appeal follows.

D E C I S I O N

I. Appellant was not denied his right to a speedy trial.

“The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Minnesota Constitution.” *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005). In Minnesota, “trial is to commence within 60 days from the date of the demand unless good cause is shown . . . why the defendant should not be brought to trial within that period.” *State v. Hahn*, 799 N.W.2d 25, 29-30 (Minn. App. 2011) (alteration in original) (quoting *DeRosier*, 695 N.W.2d at 108-09); *see also* Minn. R. Crim. P. 11.09(b).

Here, appellant asserts that the district court violated his right to a speedy trial by granting a continuance in the first trial beyond the 60-day speedy-demand limit over his objection and that his convictions must be reversed. “A speedy-trial challenge presents a constitutional question subject to de novo review.” *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009).

To determine whether a delay deprives a defendant of his right to a speedy trial, a court must balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or her right to a speedy trial; and (4) whether the delay prejudiced the defendant. *State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977) (adopting the four-part test for speedy-trial demands articulated in *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S. Ct. 2182, 2192-93 (1972)). “None of the factors is either a

necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (quotation omitted).

A. Length of delay

“Under Minnesota law, a delay of more than 60 days from the date of the speedy-trial demand is presumptively prejudicial, triggering review of the remaining three factors.” *State v. Johnson*, 811 N.W.2d 136, 144 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012). Here, appellant’s first trial began more than 60 days after his speedy-trial demand, thus triggering a review of the remaining factors. Appellant does not challenge the timeline of the second trial.

B. Reason for the delay

With respect to the second factor, “the key question is whether the government or the criminal defendant is more to blame for th[e] delay.” *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015) (alteration in original) (quotation omitted). “The Supreme Court assigned the burden of protecting speedy-trial rights to the court system and prosecutors.” *Windish*, 590 N.W.2d at 317. A “‘deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government.’” *State v. Osorio*, 891 N.W.2d 620, 628 (Minn. 2017) (quoting *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192). “But ‘[a] more neutral reason such as negligence . . . should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest

with the government rather than with the defendant.” *Id.* (alterations in original) (quoting *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192).

The cause for the delay here was that the BCA was unable to complete its DNA analysis before the originally scheduled trial date. The state did not offer a further explanation for the BCA’s inability to complete its analysis within 60 days of appellant’s speedy-trial demand. The state later received the BCA report on January 17, 2017, and the trial commenced shortly thereafter on January 23. Because there is no evidence of a deliberate intent to delay by the state, this is a neutral reason for the delay and weighs slightly against the state.

C. Strength of speedy-trial demand

An appellate court must review “the frequency and intensity of a defendant’s assertion of a speedy-trial demand.” *Windish*, 590 N.W.2d at 318. Appellant asserted his speedy-trial right on October 26, 2016, and maintained his demand when he opposed respondent’s motion for a continuance of the first trial. This factor weighs against the state.

D. Prejudice

“The Supreme Court has identified three interests that are protected by the right to a speedy trial: (1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired.” *Id.* Preventing the possibility that the defendant’s case will be impaired is the most serious interest. *Id.* “A defendant does not have to affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant’s case.” *Id.* To establish that a delay harms the defendant’s case, a defendant must “suggest evidentiary prejudice.”

Taylor, 869 N.W.2d at 20 (quotation omitted). Evidentiary prejudice may include damage to a witness's ability to recall "essential facts," the unavailability of a witness, or impairment to a defendant's representation. *State v. Jones*, 392 N.W.2d 224, 235-36 (Minn. 1986).

The first two protected interests weigh slightly against the state as appellant was held in custody during the delay. However, appellant could have stipulated to what the DNA evidence would show as a way to avoid the continuance for the BCA to complete its report but did not do so. Although the first trial was delayed 29 days beyond the 60-day speedy-trial requirement so that the BCA could complete its DNA analysis, once the BCA report was received the trial commenced less than a week later.

Under the third and most important interest, appellant does not identify any possible harm to his defense caused by the delay of the first trial. Asserting the fact that a delay occurred, without more, is insufficient to show evidentiary prejudice. Further, appellant's argument of prejudice is weakened by the fact that he sought a continuance before the second trial, which the district court denied. On this record, appellant failed to show prejudice, and this factor favors the state.

Therefore, we conclude that appellant's right to a speedy trial was not violated by the 29-day delay beyond the 60-day speedy-demand requirement.

II. The district court did not err by admitting the *Spreigl* evidence.

Appellant argues that the district court erred by admitting irrelevant and unfairly prejudicial *Spreigl* evidence of an alleged incident of sexual assault of A.W. by appellant in August 2016. A.W. testified that she met appellant when he pulled over in his car to

talk to her while she was walking. He asked for her name and number, and she gave both to him. Appellant and A.W. exchanged text messages and arranged to meet in person later in the week. On August 1, appellant picked A.W. up at her house in the evening, they met up with others, and then they returned to A.W.'s house. Because it was late A.W., allowed appellant to stay over and sleep on her couch. At some point during the night into the early morning, they sat on A.W.'s bed, and appellant tried to kiss A.W.'s neck. She told him that she did not want to do that, and he stopped. A short while later, appellant kissed her neck again, and this time he did not stop when she said no. Appellant then laid her down on the bed, laid on top of her, and held her down with a hand on her neck. Appellant took off A.W.'s underwear and sexually penetrated her with his penis. Afterward, appellant went out to his car, and A.W. locked the door behind him. Appellant then came back, first knocked on the door, then called her phone, then kicked the door, and finally went around to A.W.'s bedroom window and broke it. Later that morning, appellant sent A.W. two text messages. A.W. went to the hospital and reported the alleged incident to police later that day.

Evidentiary rulings are generally within the district court's discretion and will not be reversed absent an abuse of that discretion. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). Appellant bears the burden of showing that the district court erred in admitting the evidence and that he suffered prejudice as a result. *Id.*

Evidence of prior acts, commonly known as *Spreigl* evidence, "is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b); see *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). But *Spreigl*

evidence may be admitted for limited, specific purposes including: motive, opportunity, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan. Minn. R. Evid. 404(b); *Kennedy*, 585 N.W.2d at 389. Minnesota courts undertake a five-step process in deciding whether to admit *Spreigl* evidence:

- (1) the state must give notice of its intent to admit the evidence;
- (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and
- (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006). “If the admission of evidence of other crimes or misconduct is a close call, it should be excluded.” *Id.* at 685. The district court found, and appellant does not dispute, that the first two requirements were met here. Appellant asserts that the *Spreigl* evidence failed the third, fourth, and fifth requirements. Appellant further asserts that because the state did not provide timely disclosure of the *Spreigl* evidence to introduce it during the first trial, the state should not benefit from the mistrial by being allowed to introduce it during the second trial. Appellate courts review a district court's admission of *Spreigl* evidence for an abuse of discretion. *Ture v. State*, 681 N.W.2d 9, 15 (Minn. 2004).

A. Clear and convincing evidence

Appellant argues that there was not clear and convincing evidence that the alleged *Spreigl* incident occurred because appellant had not yet been charged with sexual assault of A.W., there were several inconsistencies in A.W.'s statements, and A.W.'s testimony was unreliable. “[A] *Spreigl* incident may be considered clear and convincing when it is

highly probable that the facts sought to be admitted are truthful.” *Ness*, 707 N.W.2d at 686.

Prior to trial, a hearing was held on the admissibility of the *Spreigl* evidence. The district court heard testimony from A.W. and an officer who investigated the incident. The court also considered BCA reports, a report of a sexual assault nurse examiner, a statement from appellant to the police, and alleged text messages between A.W. and appellant following the incident. In his statement to police, appellant initially denied knowing A.W., but after being confronted with DNA evidence, appellant admitted that he had sexual intercourse with A.W. in August 2016, that she locked him out of her house, and that he broke her window. The district court found that these facts were undisputed. The only disputed factual issue was whether A.W. consented to sexual penetration with appellant.

The district court weighed the inconsistencies in A.W.’s version of events and found that her testimony and explanations were credible, and that the undisputed evidence far outweighed any inconsistencies in A.W.’s story. We defer to the district court’s credibility determinations. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff’d*, *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130 (1993). The district court’s findings are supported by the record, particularly by appellant’s admissions. On this record, the district court properly exercised its discretion by finding that there was clear and convincing evidence to support appellant’s participation in the *Spreigl* incident.

B. Relevance

Appellant contends that the district court erred in admitting the *Spreigl* evidence because the alleged *Spreigl* incident with A.W. was not sufficiently similar to the charged

offenses with D.D. Appellant argues that the alleged *Spreigl* incident with A.W. occurred at A.W.'s house, rather than in a car, and it involved allegations of property damage, whereas the incident with D.D. did not.

Here, the district court found that the *Spreigl* evidence was relevant to show a common scheme or plan, motive, knowledge, opportunity, intent, and preparation by appellant, and to refute allegations of fabrication or consent. In determining whether an act is admissible under the common scheme or plan exception, it must have a “*marked similarity* in modus operandi to the charged offense.” *Ness*, 707 N.W.2d at 688 (quotation omitted). “[I]f the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded.” *State v. Shannon*, 583 N.W.2d 579, 585 (Minn. 1998). “[T]he closer the relationship between the other acts and the charged offense, in terms of time, place, or modus operandi, the greater the relevance and probative value of the other-acts evidence and the lesser the likelihood that the evidence will be used for an improper purpose.” *Ness*, 707 N.W.2d at 688.

Appellant argues that although both alleged incidents were generally the same type of offense—criminal-sexual conduct—that does not necessarily mean that the *Spreigl* evidence is admissible as the allegations involved were different. Appellant relies on *State v. Clark*, in which the Minnesota Supreme Court found that a district court abused its discretion in admitting *Spreigl* evidence, but concluded that a new trial was not warranted because the defendant did not establish that he was prejudiced by the error. 738 N.W.2d 316, 347-48 (Minn. 2007). In *Clark*, the defendant's acts took place 12 years apart; the only similarities between the *Spreigl* incident and the charged offense were that both acts

involved a gun used to threaten the victims, both acts occurred in the victims' bedroom, and both acts involved vaginal penetration or attempted vaginal penetration by the defendant. *Id.* at 346.

Here, the charged incident and the alleged *Spreigl* incident occurred less than two months apart in the same metropolitan area. The record shows that there were multiple similarities between the incidents including: Both alleged victims were young, African American women; appellant initially approached both in public; the incidents happened late at night; appellant had only known the alleged victims a short period of time when the incidents occurred; appellant initially made them feel comfortable around him; appellant put his hand(s) on their necks during the incidents to gain compliance; the alleged victims initially said "no" but appellant persisted and then vaginally penetrated them with his penis; and appellant sent text messages to the alleged victims after the incidents.

Based upon this record, the district court properly exercised its discretion by finding that the alleged *Spreigl* incident with A.W. was markedly similar in time, place, and modus operandi to the charged offenses involving D.D., and that it was relevant to show a common scheme or plan. Because the *Spreigl* evidence was relevant to show a common scheme or plan, we need not reach whether it was also relevant to show motive, knowledge, opportunity, intent, and preparation by appellant, as the district court found.

C. Probative value versus unfair prejudice

Appellant argues that even if the *Spreigl* evidence was relevant, the district court still erred by admitting it because its prejudicial effect outweighed its probative value. After finding *Spreigl* evidence is relevant, Minnesota courts must balance the evidence's

probative value against the risk that the evidence will be used as propensity evidence. *State v. Fardan*, 773 N.W.2d 303, 319 (Minn. 2009). As part of this balancing, the district court should consider “how necessary the *Spreigl* evidence is to the state’s case.” *Kennedy*, 585 N.W.2d at 391 (quotation omitted). If the state’s other evidence is weak or inadequate, and the *Spreigl* evidence is needed for the state to meet its burden of proof, then the evidence may be admitted. *Id.* at 391-92. However, *Ness* clarified that this is not an independent basis for admission, but rather is part of the court’s balancing test in weighing the evidence’s probative value against its prejudicial effect. 707 N.W.2d at 690.

The *Spreigl* evidence was highly probative on the issue of D.D.’s lack of consent. Much of the state’s case relied on D.D.’s testimony. Appellant challenged D.D.’s credibility, and claimed that the sexual penetration was consensual. A.W.’s testimony alleging that appellant committed a very similar non-consensual sexual penetration of A.W. suggested a common scheme or plan and bolstered D.D.’s testimony that appellant sexually penetrated her without consent. *Id.* (“[T]he evidence of other offenses may be needed because, as a practical matter, it is not clear that the jury will believe the state’s other evidence bearing on the disputed issue.” (quotation omitted)). The district court gave a cautionary instruction both before admitting the *Spreigl* evidence, and during its final jury instructions, reducing the chance that the jury would use the evidence for an improper purpose or that they would convict appellant based on a propensity to commit sexual offenses rather than on the evidence as a whole. *See State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (explaining that “[w]e presume that the jury followed these cautionary instructions”). These cautionary instructions limited the potential prejudice of admitting

the *Spreigl* evidence. On this record, the probative value of A.W.’s testimony about the alleged incident outweighed its prejudicial effect, and we conclude that the district court did not abuse its discretion by admitting this evidence.

D. Second trial

Because the state did not disclose the *Spreigl* evidence prior to the first trial and was unable to admit it at the first trial, appellant asserts that the district court erred by allowing the state to introduce it at the second trial. Appellant also argues that because testimony from a state’s witness led to the mistrial, the state should not benefit from the mistrial by being allowed to introduce the *Spreigl* evidence at the second trial. Appellant cites to no legal authority to support this position.

Issues not briefed on appeal are not properly before this court. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). “An assignment of error in a brief based on ‘mere assertion’ and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection.” *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006), *aff’d*, 728 N.W.2d 243 (Minn. 2007). Appellant merely asserts that admitting the *Spreigl* evidence at the second trial was fundamentally unfair and erroneous, without citing to any legal authority or support for his assertion. Because appellant failed to adequately brief this argument on appeal and because no prejudicial error is obvious on mere inspection, we decline to reach this issue.

E. Effect on the verdicts

Even if we were to conclude that the district court erred by admitting the *Spreigl* evidence, appellant would not be entitled to a new trial. “To warrant a new trial, the

erroneous admission of *Spreigl* evidence must create a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *Fardan*, 773 N.W.2d at 320 (quotation omitted). This court considers several factors in determining if erroneously admitted *Spreigl* evidence significantly impacted the verdict, including: (1) the strength of the state’s other evidence; (2) the presence of a cautionary instruction; and (3) the extent of the state’s reliance on the evidence during closing argument. *State v. Thao*, 875 N.W.2d 834, 839 (Minn. 2016). It is appellant’s burden to show that he was prejudiced by the evidence’s admission. *Fardan*, 773 N.W.2d at 320.

Here, the jury necessarily found D.D. credible by finding appellant guilty. *Demars v. State*, 352 N.W.2d 13, 16 (Minn. 1984) (“The credibility of the witnesses and the weight to be given their testimony are determinations to be made by the factfinder.”). The record shows that the state presented strong evidence to bolster D.D.’s testimony and to undermine appellant’s credibility. The state offered a police interview of appellant following the incident with D.D. that demonstrated his shifting story and lack of candor. The jury saw text messages from appellant to D.D., including an apology to her, stating “I promise it will never happen again.” Photographs of scratches on D.D.’s neck were also admitted into evidence. In addition to this strong evidence of appellant’s guilt, the district court gave the jury two cautionary instructions regarding the *Spreigl* evidence involving the alleged incident with A.W., reducing the risk that the evidence was misused by the jury as propensity evidence.

Although the state briefly referenced A.W.’s testimony about the alleged incident during closing argument, the state did not dwell on it. Indeed, in referencing A.W.’s

testimony, the state again cautioned the jury to use the evidence only to determine appellant's guilt in this case. The state's closing argument focused on D.D.'s testimony and appellant's shifting story during his police interview, not on the *Spreigl* evidence. Based on this record, appellant has failed to show that evidence of the alleged incident with A.W. significantly affected the jury's verdicts.

Affirmed.